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No. 81-2259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

v.

WILLIAM M. BOUBEL,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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The Respondent, WILLIAM M. BOUBEL, respectfully prays that a Writ of Certiorari *not* issue to review the judgment of the United States Court for the Fifth Circuit entered on February 16, 1982, and requests that summary reversal of said judgment not be ordered.

STATEMENT OF THE CASE

1. On August 14, 1978, Plaintiff, WILLIAM M. BOUBEL ("BOUBEL") was working in the course of his employment for Defendant, MISSOURI PACIFIC

RAILROAD COMPANY ("MISSOURI PACIFIC"), in the MISSOURI PACIFIC yard in Laredo, Texas. During that time, he inhaled noxious fumes while performing his duties of coupling an air hose between the caboose and a tank car. BOUBEL stated that he observed a metal cap hanging loose from a tank car and clear liquid was dripping to the ground from such car. It was in this very area that BOUBEL first noticed the foul odor and began to feel ill, suffering from headaches, stomach cramps and dizziness. BOUBEL also stated that his throat and lungs became irritated by the fumes.

2. BOUBEL was thereafter treated by a physician and hospitalized. Following the hospitalization, he continued with medical care and was forced to remain off work from August 1978 to January 1979. Thereafter, he returned to the railroad yard work, but was unable to continue the extra employment he had of small engine repairs. As of the time of trial, he had not been able to resume this extra source of financial income.

3. The trainmaster at the yard, Mr. Amador Hinojosa, stated that it was MISSOURI PACIFIC's duty to inspect the railroad cars as they came across the Mexican border and further that he himself had actually smelled noxious odors in the area of which BOUBEL complained.

4. BOUBEL brought suit under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq., ("FELA") seeking damages for the injuries referred to above. The United States District Court for the Southern District of Texas submitted the case to the jury on a general charge. The jury found Defendant, MISSOURI PACIFIC, negligent on the occasion in question and that such negligence was a cause, in whole or in part, of BOUBEL's

injuries. The jury determined that the amount of $55,000 would fairly and reasonably compensate BOUBEL for the injuries sustained as a result of Defendant's negligence. On February 16, 1982, the Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court.

SUMMARY OF ARGUMENT

Sufficient evidence, from which reasonable inferences may be drawn, is contained in the record, that MISSOURI PACIFIC was negligent in allowing noxious fumes in the work area or in working the employees in proximity to such fumes. Such sufficiency clearly existed when considered in light of the reduced measure of proof of negligence required to sustain a verdict for a plaintiff in a FELA case. Further, one cannot determine from the general award of damages that any improper or unsupported elements were considered by the jury in reaching its verdict.

ARGUMENT

I. NEGLIGENCE

A. Standard of Negligence

Petitioner, in seeking this Writ of Certiorari, has accepted an onerous, indeed, overwhelming task. This Court has indicated that the railroad employee is to be given benefit of any doubt in making an evidentiary determination. *Gallick v. Baltimore & Ohio R.R. Company*, 372 U.S. 108, 116 (1963). Congress intended for the jury to determine these cases and that fact-finding role has been carefully guarded by this Court over the years. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354

(1943); *Ellis v. Union Pacific R.R. Company*, 329 U.S. 649 (1947) (jury has choice of conflicting versions of how the accident happened, who was telling the truth and inferences drawn from uncontroverted facts). As this Court has stated, "Only when there is a complete absence of probative facts to support conclusions reached by a jury in Federal Employers' Liability Act cases, does reversible error appear." *Dennis v. Denver and R.G.W.R. Company*, 375 U.S. 208 (1963). That affirmation of a trial jury's decision is repeated in many other cases, including, *inter alia*, *Lavender v. Kurn*, 327 U.S. 645 (1946), and *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500 (1957). The *Dennis* case clearly indicates that where the railroad employee's evidence in an FELA case, though vigorously disputed, was sufficient to support the jury's conclusion that the railroad's negligence contributed to the injury, the appellate court's function is exhausted, and it cannot properly substitute its judgment for that of the jury and decide that it was the employee's own conduct that resulted in his injury. In *Flewellen v. Logan*, 106 F.2d 151 (5th Cir. 1939), the Fifth Circuit echoed the decision by this Court that appellate courts ordinarily refuse to reverse rulings of a trial court based on the jury's findings unless they are clearly contrary to the weight of the evidence.

B. Evidence of Negligence

The trial court record is replete with testimony which provides evidence that MISSOURI PACIFIC was negligent and that such negligence was a cause in whole or in part of injuries suffered by the Respondent. It is undisputed that Respondent suffered an injury from breathing toxic fumes while working for MISSOURI PACIFIC in the Petitioner's yard at Laredo, Texas.

The testimony of the first witness in this case, Amador Hinojosa, trainmaster for the MISSOURI PACIFIC, establishes the negligence of the MISSOURI PACIFIC. He had been to the area where the Respondent had inhaled the fumes and admitted that there were fumes in the area:

"Q. And you agree with me that fumes—you didn't see any rotten eggs laying around on the ground, did you?

A. No, sir.

Q. All right. You didn't see anything that would lead you to believe that it's anything except fumes that was coming from a tank car, do you?

A. Not a tank car. Probably a box car. We got chemicals in box cars. Something was smelling. But I couldn't pinpoint it, like I told you.

Q. So the point is that you simply couldn't pinpoint if it was a tank car or a box car?

A. It was smell, that's right. (sic) We don't know know where it was coming from. I looked all over that yard.

Q. But you knew that it was coming from one of those cars.

A. It was coming from some place. I don't know where it was coming from. I don't know if it was a box car or some place else.

(T.R. p. 47, l.7 - l.24)

* * * *

Q. You felt that if they inhaled those fumes, as they explained to you, they told you that they were feeling bad; that you were concerned that something down there was not safe. Is that right?

A. Well, I went down to check to see what the problem was.

Q. Because you were concerned that it was not safe?

A. Anything that got to do with safety, I check.

Q. Okay. And you would agree that if they smelled those fumes, and if they were getting sick to their stomach, as they told you about, and they were having dizzy spells, that that was something that you were concerned about as to whether or not that was a safe place down there. Is that right?

A. That's right.

Q. And, of course, that's not just your personal duty, but that's the duty of the railroad generally, and officers and employees?

A. Right. To check up and see what the problem is.

Q. And to be sure it's a safe place for the folks down there at the yard to work. Is that right?

A. That's right.

Q. So, as I understand it up to here, Maldonado told you that he had inhaled those fumes?

A. He told me that.

Q. Cavazos told you—

A. —I don't remember Cavazos. But I think he did say that.

Q. And of course, Mr. Boubel told you?

A. Um-Hum.

Q. And you yourself had gone down there? And you smelled it?

A. Yes, sir. I went by the tank.

Q. And you were concerned that if it was a bad stink down there that it was an area that you didn't want—You didn't think Boubel or the other people on his crew to stay around. Is that right?

A. Well, I went up there myself and checked it. And it was coming out of some place in the yard. But we couldn't pinpoint where it was coming from.

(T.R. p. 44, l.16 - p. 46, l.4)

* * * *

Q. No. My question is do you agree with me that if there were fumes escaping from one of the cars, would you agree that that's not a safe situation? Would you agree with me?"

A. Well, probably so.

(T.R. p. 47 l.2 - l.6)

MISSOURI PACIFIC had never fulfilled their duty to locate and control the dangerous escaping fumes, although their own employee admitted that he could smell them by simply walking through the area. The negligence and proximate cause issues are most clearly evidenced by Respondent's own testimony beginning at page 78 of the trial transcript. In that testimony, Respondent testified to smelling the fumes as he was doing his work on the caboose and tank car. He testified to looking under the tank car and seeing a metal cap hanging loose and some clear liquid dripping on the ground out of that tank. This testimony was not refuted under cross-examination and clearly establishes evidence sufficient to put Issue Number One, going to the negligence of MISSOURI PACIFIC, and Issue Number Two, going to the proximate cause problem clearly within the province of the jury.

MISSOURI PACIFIC had a duty to provide safe premises for Respondent to work. "Safe premises" does not include areas reeking with toxic fumes, such as those inhaled by BOUBEL during the course of his work. MISSOURI PACIFIC did not meet the duty placed upon it. Rather, they allowed toxic fumes to escape, resulting

in injuries to Respondent. There can be no doubt that there is evidence sufficient in the record to sustain the jury's findings. MISSOURI PACIFIC, in failing to provide a safe place for its employees to work exposed Respondent to toxic fumes. This exposure resulted from the negligence of the MISSOURI PACIFIC in failing to properly inspect cars coming into their railyard, allowing employees to work in an area filled with escaping toxic fumes, and in failing to take steps to remedy the situation. This fact question was established, when the Respondent stated that the metal cap was hanging loose from the tank car, and clear liquid was dripping to the ground from such car. (T.R. at p. 78). The fact that Mr. Hinojosa could not locate exactly where the smell was coming from does not negate the evidence that the exposure happened and that this exposure was the proximate cause of Respondent's injuries.

Petitioner makes a special point of the fact that inspections of the railroad cars were made by the Petitioner on a regular basis. These inspections of the railroad cars took place at the border between the United States and Mexico and also when they arrived in the yard. Petitioner attempts to use the fact of these required inspections to shore up its allegations that due care was taken by the railroad. It was the *breach* of this duty to inspect and to insure, through reasonable diligence and care, a safe place to work for BOUBEL and other railroad yard workers that constitutes the grounds for the jury's finding of negligence. The inspection of these tank cars, if done at all, was obviously not done thoroughly and properly. The purpose of these inspections was to prevent occurrences like the one in question. Mr. BOUBEL received an injury; the evidence was sufficient for the jury to conclude

that MISSOURI PACIFIC did not thoroughly inspect the cars at the bridge or in the yard and that such conduct was negligent. The evidence supports the jury's conclusions that such negligence was the proximate cause of the injuries sustained by the Respondent.

Petitioner cites the case of *Shelton v. Thomson*, 157 F.2d 709 (7th Cir. 1946). This case is irrelevant to the present case. In *Shelton*, it was alleged that one point of negligence lay in the failure of the defendant to make suitable and proper inspections. Petitioner attempts to use this case to show that *any* inspection is a proper inspection, which is contrary to the holding in this case. This case supports the proposition that because gas was in the work area and could be smelled by anyone, including company inspectors, and a tank car in the yard was leaking fumes from an open cap, that the railroad did not inspect the cars, or was negligent in doing so. Petitioner correctly cites *Nevins v. Southwestern Railroad Company*, 425 F.2d 114 (5th Cir. 1970) for its holding that the standards of liability under the FELA are significantly broader than ordinary common law negligence actions. Indeed, this Court has held that the test for causation is simply whether the employer's negligence played any part, *even the slightest*, in producing the injury.

Petitioner would have this Court believe that the element of foreseeability of the injury would be eliminated simply because the employer presumably made inspections as a regular course of business. Whether or not those inspections were made is really a peripheral issue in the present case. The important point, the one on which Respondent makes his claim, is that the employer failed to provide a safe place to work. This contention is supported by the testimony that the railroad had the duty

to provide a safe place to work, that they failed to perform this duty, and that the cap was left off the tank car. Only a complete absence of probative facts would allow Petitioner to prevail on this point. Clearly, the trial court record stands as an open refutation of that allegation.

II. DAMAGE ISSUE AND INSTRUCTIONS

In affirming the decision for Respondent in this case, the Court of Appeals for the Fifth Circuit stated simply:

> "[A]ppellant's claim that the verdict is excessive must . . . be rejected. We cannot determine from the general award of damages that any improper or unsupported elements were considered."

(Appendix A, Petitioner's Brief, p. 1a) The Fifth Circuit had no difficulty in applying to the instant case the test it adopted in *Narcisse v. Illinois Central Gulf Railroad Company*, 620 F.2d 544 (5th Cir. 1980). In determining if an award is excessive, the test is whether or not the jury verdict is "clearly within the universe of possible awards which are supported by the evidence." *Supra*, 548. This language by the Court points out the broad discretion allowed a jury in determining damages for the Respondent. In the trial court, His Honor Judge Kazen, in his memorandum and order going to the remittitur issue states:

> "In the case at bar, given the testimony as to the Plaintiff's past, present and future physical discomfort, loss of overtime income and loss of side income, this Court cannot conclude as a matter of law, the jury's verdict is outside the universe of possible awards which are supported by the evidence. Accordingly, the Defendant's Motion for Judgment N.O.V. and New Trial are hereby denied."

(Appendix B, Petitioner's Brief, p. 4a)

Respondent would point to the trial court record for a demonstration of the evidence presented in that forum which supports the submission of question number 3 to the jury in regard to damages, past and future. An examination of that record reveals testimony from Mr. BOUBEL and others in regard to future physical pain and mental anguish and also future loss of earning capacity:

"Q. Did you notice whether or not if any smoke or any other kind of fumes bothered you in any way?

A. Today, all fumes still bother me.

Q. How about back in that particular time in September to December of that year, did you notice anything?

A. Are you talking about after I came back from Houston, in that period?

Q. Right.

A. That is correct. I put no smoking signs on all my doors. The wife—

Q. At your house?

A. At my house. The wife had to quit using certain perfumes. Any kind of fumes affected me."

(T.R. p. 95, l.8 - l.20)

* * * *

"Q. Now, were you working, doing this lawn mower repair business, in off hours, say in 1977?

A. I was doing it for about ten years, that's correct.

Q. Ten years. All right. *Now how about after August of 1978, did you continue this work?*

A. *I had to close the business down. I couldn't handle the work. I couldn't get the machines out. I turned all machines that were not fixed back to their proper owners.*

Q. And did you—have you ever gone back to this lawn mower business?

A. *No, sir. I can't handle no extra work.*

Q. Have you tried to work on lawn mowers during that time that you were home under doctor's orders.

A. I tried to—a few things. But evidently, when I come home from work now, the system—seems through the 2½ years, the body system seems to be—is stronger.

It's not—I'm not back like I was before the incident. I still have itching of the body today, and sore throat and the burning at the top of the lungs, even though I have been to quite a few specialists."

(T.R. p. 98, l.24 - p. 99, l.18) (Emphasis Added.)

* * * *

"Q. You heard me in my opening statement make some remark. And you told me about some business that you had working on lawn mowers. Would you tell the Court and Jury what we're talking about there in the lawn mower business.

A. Well, when I went to work for the railroad, you're on what they call an extra-board. In other words, they'll call you when they need you only.

So I had built up this lawn mower job since I like mechanics, and I worked mechanics all my life.

I had built up this job for protection. So when I didn't work too much for the railroad,

I could work on lawn mowers. And I had built this up into a pretty good business.

The fact is that I had most all the stores in town that I was fixing for, plus something like maybe 2,000 regular customers a year.

Q. When you're talking about lawn mowers and customers, you're talking about the kind I have to go out in the front yard—

A. Lawn mowers, push mowers that cut your grass, self-propelled, riding mowers, all machines just.

Q. What were some of the stores that you did work for?

A. Western Auto, Mike's Auto, Border Foundry, Laredo Garden Center, your H.E.B. Stores, sheriff's department, the school department, U.S.D.A.

I think that covers pretty well the business plus I think something like 2,000 regular customers that brought them to me every year."

(T.R. p. 97, l.21 - p. 98, l.23)

* * * *

"Q. Okay. In addition to the lost wages, this figure that you calculated in here, $10,958; *have you made a calculation as to how much income that you would have received from this lawn mower repair business that you had?*

A. *Well, it was averaging between, close to ten, twelve thousand dollars a year.*"

(T.R. p. 107, l.23 - p. 108, l.3) (Emphasis Added.)

* * * *

"Q. Tell us how you feel today. As you sit before this Jury and the Court, how do you feel?

Do you feel like you did before August of '78.

A. No. The body is getting stronger. It's still getting stronger as time goes by.

No, it's not like it was in, before '78.

Q. What bothers you that you say is not the same? What bothers you?

A. No, well, I have a continuous nagging cough that has been there, and—Ever since the beginning, and it don't go away.

And if I smell cigarette smoke, the fumes or something—I don't know what it does—I cough up a clear liquid out of the lungs.

I have explained this to all of the doctors, what is happening, that I've been to.

And I believe Dr. Jenkins in Houston, he did run a scope down my nose and looked at my lungs and said—and my throat, and he said it was irritated but nothing to worry about.

Q. So other than your lungs and your nose, what else? What bothers you today?

A. Well, the eyes stay red all the time around the rim. And I still have the itching. If I don't take a shower every day, if I go to bed without a shower, I start itching, mostly along in, in the, here in the lung area.

If I go take a shower and clean off, after a while that will go away."

(T.R. p. 100, l.7 - p. 111, l.10) (Emphasis Added.)

Respondent contends that there is ample evidence to support findings in regard to both future physical pain and mental anguish and also loss of future earning capacity. Indeed, Respondent testified to the physical pain and suffering, which he had endured since the date of

the accident. Respondent testified that even though he had been somewhat better, he was not completely recovered. (T.R. p. 110). The Court instructed the jury in the charge that they were permitted to draw such reasonable inferences from the testimony and exhibits as they felt were justified in light of common experience. (T.R. p. 274). In other words, they were told they could make deductions and reach conclusions which reason and common sense lead them to draw as established by the testimony and evidence. Thus, the jury was permitted to and may have drawn from this evidence grounds for future pain and mental anguish on the part of the Respondent as well as loss of future earning capacity.

As indicated, Respondent testified as to the very successful lawn mower repair business that he had had over the years, and further testified that he was unable at the present time to do such work. This is testimony going to the damages issue of future earning capacity. Without question, this is an area of evidence upon which the jury could rely to find the loss of future earning capacity. Respondent testified as to what his wages had been in the past in the lawn mower repair business and the fact that he was not in that type of work at the present time. Thus, there was certainly sufficient evidence to support a finding of loss of future earning capacity.

There is another very important point which needs to be made at this stage. The jury was instructed they were to consider the following elements of damages and none other:

a. Physical pain and mental anguish in the past;

b. Physical pain and mental anguish which in reasonable probability he will suffer in the future;

c. Loss of earnings in the past;

d. Loss of earning capacity which in reasonable probability he will suffer in the future.

In answer to this question, the jury answered $55,000.00. Petitioner only complains with respect to "future pain and suffering" and to "loss of future earning capacity." There were *not* separate items of damages found by the jury but rather, a lump sum. There is no way that Petitioner or for that matter, Respondent can discern from the record what portion applied to which elements of damages. Therefore, to say that the jury granted excessive amounts in some of those categories is an exercise of conjecture by Petitioner only and has no basis in the record. Indeed, there is no way of knowing whether or not the jury placed *any* amount of damages on the "future pain and suffering" and "future loss of earning capacity."

Petitioner in its brief presents evidence which was submitted to the jury which it contends would refute Respondent's claim. Respondent does not deny that evidence was presented which attempted to refute the allegations he made. However, the jury in its discretion and following the directions of the judge, in its wisdom, weighed the issues presented to it and came to its decision. As the law dictates, it would be a clear abuse of discretion for this Honorable Court to invade the province of the jury and to in fact substitute its judgment for that of the jury. The Fifth Circuit Court has many times held that was a step it would not take, absent extreme circumstances. Those extreme circumstances do not appear in the present case. *Marmo v. Chicago, Rock Island & Pacific R.R. Co.*, 350 F.2d 236 (7th Cir. 1965); *Padgett v. Southern Ry.*

Co., 396 F.2d 303 (6th Cir. 1968); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

Petitioner points to the case of *Henry v. A/S Ocean*, 512 F.2d 401 (2nd Cir. 1975). The Petitioner contends that *Henry* bears scrutiny as it relates to the present case. However, it is very easy to distinguish the two cases. In the *Henry* case, the court pointed out that there was *no* evidence offered to prove a link between the continuous colds the plaintiff experienced to the accident that he had which was the basis of the suit. Since there was no link in the record, to injuries as being caused by the incident at work, the court held there was insufficiency of evidence to establish damages. The present case offers no such problem. The evidence adduced at the trial court clearly indicates that the damages suffered by Respondent were linked to the exposure to the toxic chemicals. Respondent himself testified to that fact and there is little dispute that the exposure to the toxic chemical produced the problems which the Respondent incurred.

Petitioner also cites the case of *Rivera v. Rederi A/B Nordstjernan*, 456 F.2d 970 (1st Cir. 1972). That case properly states the attitude appellate courts take in overturning jury awards. The court stated:

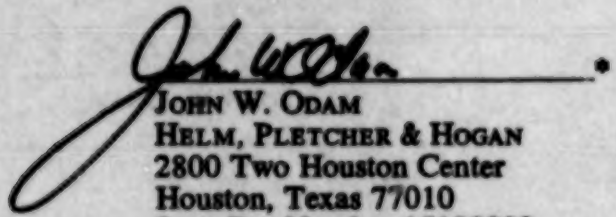
> "In examining the contention that the damages awarded were excessive, we must view the evidence most favorably to the injured Plaintiffs, for we are more reluctant to overturn a jury verdict, especially where the sums include unspecified compensation for pain and suffering. We will disturb a jury award only where the sum is 'so excessive that the District Court's refusal to order a new trial constitutes a manifest abuse of discretion.'" (974, 975)

In summation, it is difficult to perceive that there is any merit to Petitioner's contention that the damages awarded for future physical pain or mental anguish or loss of future earning capacity are excessive. The damages issue was not submitted separately as to each item the jury was entitled to consider. To now claim that the verdict was excessive because of the inclusion in the trial court's instructions that the jury could consider these two areas is, at best, unfounded and, at worst, amounts to conjecture by Petitioner. It amounts to mere supposition on the part of Petitioner that the jury gave *any* credence to future pain and suffering and loss of earning capacity. Perhaps none was given. Perhaps the entire amount is based only on consideration of past pain and suffering from 1978 through 1980. For this Honorable Court to now reduce the jury's award would be a substitution of its judgment for that of the jury, an improper action in this case.

CONCLUSION

Accordingly, the Petition for Writ of Certiorari should be denied and the decision of the Court of Appeals for the Fifth Circuit in affirming the District Court's decision, should be affirmed.

Respectfully submitted,



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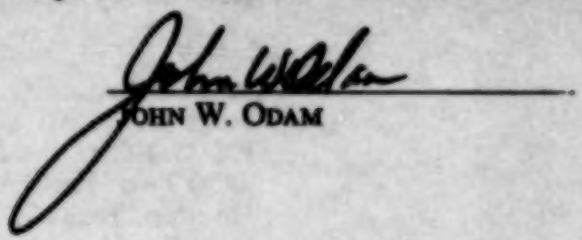
CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 1982, three copies of Respondent's Brief were mailed, by first class mail, postage prepaid, to Moulton S. Dowler, Jr., Gresham, Davis, Gregory, Worthy & Moore, 1800 Frost Bank Tower, San Antonio, Texas 78205. I further certify that all parties required to be served have been served.



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